No. 88-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, BY HER PARENTS AND CO-GUARDIANS, LESTER L. AND JOYCE CRUZAN,

Petitioners,

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,

Respondents,

v.

THAD C. MCCANSE, GUARDIAN AD LITEM,

Respondent,

On Writ of Certiorari to the Missouri Supreme Court

BRIEF OF MECHTILD GROTHUES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LFAVE TO FILE A BRIEF AS AMIGUS CURIAE ON BEHALF OF RESPONDENT

Amicus hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of the parties is expected but has not yet been received and filed. When filed, it will make this motion unnecessary.

INTEREST OF AMICUS CURIAE

Like the comedian said: "This is deja vu all over again." Mechtild Groteus, a native of Germany, lived through the Nazi years. They made an impression on her. She has since studied them. In 1975, she translated into English for publication "The Release of the Destruction of Life Devoid of Value", excerpts from which comprise this brief. Picture the scene. Defendants are on trial for crimes against humanity. They are asked: "Why?" Defendant Brackett answers for all:

"Because of the arguments for euthanasia in 'The Release of the Destruction of Life Devoid of Value.'" [Trials of War Criminals before the Nuremburg Military Tribunal Under Control Council Law No 10, transcript page 7633]. Groteus then lives to see the German Supreme Court rule for life in an abortion case based on the lesson learned that there is no stopping place once you define any innocent human life devoid of value. She sees the US Supreme Court considering declaring that certain unconscious persons are lives devoid of value which should be starved to death. She thanks this Court for comparing the arguments herein blamed for so much evil in Germany with similar arguments utilized to justify reversal in the present case, and asking: "What is the chance a decision to reverse herein will not be the first step to huge evils?

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SUMMARY OF ARGUMENT

You are asked by appellants to adopt a way of thinking, to determine certain lives [not yet dead] to be devoid of value. Why? So that by a fiction you can say that the soon to be deceased is exercising through substituted judgement a right to refuse nutrition and hydration and commit suicide by starving to death. You cannot reverse without finding an unenumerated US Constitutional Right to find certain lives devoid of value. You will have adopted a philosophy. At the War Crimes trials, both prosecution and defense blamed the killing on the acceptance of the philosophy set forth in the book "The Release of the Destruction of Life Devoid of Value". Excerpts from the book follow. The philosophy set forth herein is substantially identical to the philosophy necessary to reverse.

LEGAL ARGUMENTS by Professor Doctor of Jurisprudence and Philosophy Karl Binding

At the end of my life I am posing the daring question on which I have reflected for years. Many evade this question because they feel it is of such a delicate nature and so hard to answer. That is why it is said rightly we are dealing here "with a topic fixed in our moral and social view."

The question is this: Should the permissible destruction of life which in our current law-except in a moment of distress-applies only for suicide be lawfully extended to a second class of people and to what extent?

In dealing with this question we encounter different cases the facts of which fill each of us with deep shock.

That is why it is of utmost importance to disregard emotions and exaggerated considerations. We should rather discuss everything in a cool and legal way. We must base our discussion on these strong fundamentals.

That is why I place the greatest importance on strict legal argument. In order to have a solid starting-point, we have to consult the current law:

Except for an emergency, under what conditions may we release the destruction of human life and what do we understand by that? "Release" means something quite different than the recognition of rights to kill.

Here we are not considering the right to kill.

It is necessary to clearly set forth in a scientific way this positive legal starting-point, because it is only

vaguely understood and often even completely misunderstood by many.

I. THE CURRENT LEGALITY OF SUICIDE

Its so-called participation.

Every man is pushed into existence by a force which he cannot resist. The object of his life is to cope with this fate. In so far as he is the born sovereign of his life, how to cope with this fate within the limits of his surroundings is his own decision. Since the individual had no part in the decision to determine for himself how much strength he needed to carry this heavy load of life, everyone should have the right to terminate his own life. The right to terminate one's own life has finally gained recognition again. For a long time the Church demanded recognition of the false, unchristian philosophy that the God of Love wants man to die only

after immense physical and spiritual pains. Except for a few backward countries, every state adheres to the regained principle that one can terminate one's own life. The Natural Law defines the freedom to terminate one's own life as one of the first fundamental rights.

Law has no choice but to consider man as the sovereign of his life and fate. From this comes the following important conclusions:

1. Man's right to be a sovereign is limited to himself. Only his action toward his own life is not prohibited.

2. Recognition of man's sovereign right to end his own life is not an exception from the law not to kill, for the law not to kill only forbids the killing of another person and does not forbid suicide.

3. Every participation in suicide by another person is unlawful and may or even must be punished, unless no guilt is evident.

4. Only the action of the suicide is permissible. He has no ability to render the action of another person allowable, even if he gives his consent. There is good reason for our positive law declaring the killing of a suicide by a consenting participant to be wrong.

5. So long as the suicide knows what he is doing, no one may prevent him from committing suicide which is not prohibited. He even has the right to self-defense in the case of suicide-prevention. The force being exercised in suicide-prevention is an unlawful duress.

6. In most cases, persons attempting to prevent suicide act in good faith and they are not subject to

punishment. A good reason for their action is the experience that in most cases the person attempting suicide is very glad to be rescued and very frequently will not attempt a second suicide.

II. NO SPECIAL RELEASE OR LEGALIZATION OF PURE EUTHANASIA IS NEEDED, SO LONG AS IT IS WITHIN ITS CORRECT LIMITS.

Considering euthanasia from a pure causal point of view, it undoubtedly seems at first hand to be a killing of a third person.

The word `death assistance' which is mentioned in recent publications is unlovely and ambiguous. We do not include here pain relieving medicines which do not change the cause of death. It is only important to consider the change of a painful cause of death, originating in an often long-lasting

illness, to a less painful but different cause of death.

As an example of euthanasia, a person, suffering from a very painful tongue cancer, receives a deadly morphine injection by a doctor or another kind helper. This injection causes a painless death which might occur quite soon or only after a long time interval.

Unnecessary dispute has arisen in regard to the legal nature of this action, its unlawfulness or its permissiveness, for there is no subjective right to this euthanasia. The same problem arises in medicine, better called the healing profession, where some claim an attack on health, especially an attack on the integrity of another persons's body, if a doctor gives a patient an early death with dignity.

The situation in which euthanasia is carried out has to be divined with precision. A patient, suffering from internal illness or an injury will, because of his sickness or painful wound, die very soon and without doubt. The time difference between the cause of death by the sickness and that of the substituted means is of no importance. Only a narrow-minded pedant would talk here about a noticeable shortening of life.

The case of a paralyzed person whose life expectancy is several years and who is given with or without his consent a deadly dosage of morphine, is not pure euthanasia. In this case the deed done is the shortening of life, which is not released or lawful and is impermissible.

This changes at the same moment it becomes evident that a certain painful

death is imminent. The situation of imminent death is not being changed, only the cause of death is being replaced by another cause which has the advantage of being painless. Legally speaking this is no killing, only the changing of the cause of unavoidable death: In truth it is a pure healing action; `The elimination of pain is also healing.'

Only a barbaric law could declare that such action is unlawful killing, and that the sick person, where death is imminent, has to die from his pain. No one would say something like that anymore.'

It is a shame that in former times people have theorized and acted in this manner.

This we have to conclude: We are not dealing here with an established exception of the law: `Not to kill.' We

are not dealing here with an unlawful killing, but with an unprohibited healing action carried out as a blessing for the suffering, as a pain relief for the nearly dead since it is not done for the purpose of killing them, but to relieve suffering.

Thus, we have to call this type of euthanasia an unprohibited action, even if the law does not specifically mention its lawfulness.

Granting death with dignity is not dependent on the consent of the tortured sick person. Of course, death with dignity should never be granted against his known wishes, but very often, persons who are momentarily unconscious have to be submitted to this healing intervention.

By the nature of this type of granting death with dignity, we can see

that the assistance to and the regulation of this action is unprohibited.

A person administering euthanasia because of his erroneous assumption that death is imminent may have to be made responsible for negligent killing.

III. BASIS FOR FURTHER RELEASE

The result of our preliminary analysis is this: Only suicide is not prohibited at this time. We are not even mentioning the extension of this nonprohibition of suicide to so-called participants who help the person commit suicide. This is so because suicide in all its forms is wrong. Even if consent is given by a person committing suicide, that does not change suicide to make it permissible. However, due to the penal code's wrongful stressing of the treatment of so-called participation, the assistance to suicide must go unpunished

and no instigation to suicide may be found in the planning of the decision nor does it matter if the person committing suicide was sane or not.

Accordingly, since suicide is wrong, a further release or legalization could only mean the legalization of the killing of another person. Unlike the legalization of suicide, it would result in a narrowing of the legal killing prohibitions. Arguments for this legalization have recently been heard and the motto for this movement has become: 'The right to death with dignity.'

By death with dignity, we don't only mean the right to death with dignity, but much more, the legally acknowledged right to the complete relief of an unbearable life.

The way for this new movement is being prepared by two trends. The more

radical of the trends is founded on the theory of deduction and law interpretation by the Supreme Court and other courts. The other more lawful and cautious trend is based on the legislative process.

The current trend within legislatures is also towards legalizing consent to the giving of death with dignity. This consent, because of its clear perceptibility and easy demonstration, often increases to the wish for death with dignity.

IV. DOES THE INCREASE OF PRIVILEGED REASONS FOR KILLING CAUSE THE RELEASE OR LEGALIZATION OF THE KILLING OF A THIRD PERSON?

Quite a number of well known lawyers consider killing after a consent for death no longer unlawful. Accordingly, they express the wish that the killing of

the consenting person should not be punished. There are also people who are filled with noble compassion for the terrible suffering people and who raise their voices asking for the killing of these. Considering this, the following question has to be asked: Shall we not change the law relating to one or both of these extenuating circumstances to suspend punishment, or shall we at least in the case that both privileged causes, consent and unbearable suffering, concur consider the killing as justified and as unpunishable? It is quite interesting to note that the author of the preliminary proposed law of 1909 does not at all consider the granting of death with dignity to a hopelessly sick person without his consent `to be a privileged cause.'

How backward are the present German laws compared to the Prussian Law II, Title XX, Section 8833 which so generously and with legal expertise decided: `Who in the best of his judgment kills a mortally injured or a critically ill person is to be punished as a negligent manslaughter, Section 778, 779.' The mentioned punishment is very mild: Confinement in either jail or fortress `from one month to two years.'

More than one hundred years have passed and this precious statement has born no fruit for the German people.

The Norwegian Law of May 22, 1902, Section 235 compared this kind of killing with the killing of a consenting person.

The motive of the German opponents of the proposal of 1909 are as follows: `Such regulations might be terribly abused and the life of the sick might

become considerably endangered.' They also state that it is very hard to find a suitable wording for such a law.

For the time being I want to leave this discourse and come back to it later. The legal business of formulation of laws seems at first to be very heartless. In reality the concern for formulation born out of deep compassion. Above all I want to pass on this preliminary most urgent question: 'Is there any human life that has to such a degree lost its legal rights, that its continuation is of no value for itself or to society?'

In asking this question, anyone who is used to evaluating every life for the person himself as well as for society will experience an uneasiness.

One painfully realizes how wastefully we treat life that is precious and full of vigor and power and how much

wasted manpower, patience and capital investment is invested at the same time to keep life not worth living alive until finally, often awfully late, nature triumphs.

If you think of a battle field covered with thousands of young people or of a mine where hundreds of industrious miners are covered alive by cave-ins and if you think at the same time of all the institutions for mentally sick persons and all the charities people get, then you are realizing the disharmony between the sacrifice of this great good--mankind in its fullest measure--and the tremendous care that these creatures receive; creatures of no value at all, indeed who are quite an obstacle.

There are undoubtedly living people whose death means a final release for themselves and at the same time a relief

of a burden for society and for the country. This burden serves no useful purpose, except maybe to give an example of highest unselfishness.

Realizing that there is indeed human life whose continuation is of no interest to any reasonably thinking person, then it is up to the legislature to ask this fateful question: `Is it our duty to continually defend this unsocial life by giving it full protection of the law or is it our duty to release it for euthanasia?' You could also pose this question from a legal point of view: Shall we prefer to see the continued support for this kind of life as an example of the sacredness of life or shall we consider the legalization of the mercy killing, so relieving for all those involved, as the smaller evil.

If we use sound reasoning, there is no doubt about the answer to this question. I am convinced, however, that we should not only use sound reasoning to arrive at a definite answer. A deep feeling of truth and accuracy has to be part of this answer. Every unpunishable killing of a third person should at least mean a redemption for himself. Otherwise no legalization can be permitted.

One very important conclusion becomes necessary: The full respect of everyone's desire to live, no matter how sick, how tortured and how useless.

Legislation should be drafted to make impossible the use of any force, even indirect, in breaking down the desire to live as such an action is characteristic of murder and manslaughter.

Of course we could never talk about the legalization of euthanasia of a mentally ill person who is quite happy in his state of life.

As far as I can see, we have to consider two main groups of people on the extremes with a middle group between:

1. The irretrievably lost because of sickness or injury who in full consciousness of their situation have expressed their desire for complete relief--death with dignity.

The previously mentioned privileged reasons do here concur. I think especially of the incurable cancer patient and others terminally ill with a disease of similar gravity or mortally wounded persons.

It does not seem necessary to me that the desire for death is found only in unbearable pain. Painless despair

deserves the same compassion.

No importance should be given to the consideration that under better conditions the patient could have been saved, if these conditions are not available. `Irretrievably lost' is not meant in its absolute meaning but as irretrievable in this specific situation.

The consent or the desire of the patient and not only the seriousness of the condition is a very necessary condition for euthanasia. Both people involved should have correct information. A mere assumption of a hypochondriac that his condition is beyond hope should not be sufficient. The person administering euthanasia should also have full knowledge of the background of the person desiring death.

There is no point of view, not legal, social, moral nor religious which

presents a good reason for failure to legalize the euthanasia of those persons desperately desiring death with dignity by those who are apt to do so. I consider this release or legalization a simple duty of justified compassion. We often apply compassion to various cases. The way in which this should be done will be discussed later.

Should we show consideration for the feelings and strong interests that the relatives of the patient might express for the continuation of this life? The wife of the sick person, who loves him a great deal, may cling to his life. Perhaps he supports his family by his pension, and so they refuse this act of mercy.

It seems to me, though, that compassion towards the incurably mortally ill person should come first. None of

his loved ones will be able to help him carry his mental agony. He can do nothing for them. Every day he becomes entangled in more suffering. He might become a very heavy burden for them. He has to decide if he is able to continue to carry on this lost life. The relatives right to objection, the right to hindrance cannot be justified if and only if the patient's desire for euthanasia is a very strong one.

The second group is composed of incurable idiots--no matter if they have been born one or if they have become like one at the last stage of their suffering, as for example the paralytics.

They have no will for life or for death. They give no definite consent to the euthanasia. On the other hand they have no desire to live which might have to be broken. Their life is completely

useless, but they don't consider it unbearable. They are a very heavy burden both for the relatives as well as for society. Their death creates no vacuum, other than perhaps for the mother or the faithful nurse.

Because they need considerable care, they are the cause for new job creation, the aim of which is to completely support worthless life year after year.

That these exist is a terrible discrepancy, a misuse of manpower for unworthy purposes. This fact cannot be denied.

Again I see no reason, neither from a legal, social, moral nor religious point of view to forbid euthanasia of these people. These people are just a caricature of true man and arouse dismay in everyone. Of course, euthanasia could not be given to just anyone! In time of

higher morality--our time has lost all sense for heroism--these poor people would be delivered from themselves by legal authority. But who would in this time of unfeelingness dare to talk about the necessity and justification of euthanasia of these.

And so we have to ask now: To whom may and should we give the right to consent for euthanasia for these idiots? I would think first of all to the relatives who have to take care of them - and who are burdened by them, even if the sick person is being taken care of in an institution; and then also to their guardians, in case both of them apply for euthanasia for the patient.

We could also give the managers of those institutions the right to apply for euthanasia. The mother, who in spite of his miserable state, still loves her

child, should have the right to appeal, but only if she takes care of the nursing and the financing of the nursing of her child by herself. It would be best to apply for death with dignity as soon as incurable idiocy has been confirmed.

I want to touch only briefly on the question of whether we should not also extend this charity to those born severely deformed. For years I have observed with shock the lack of feelings towards these poor people who often be come a cause for exposition and sight-seeing and mockery!

I have mentioned a middle group including mentally healthy persons who through illness or accident, maybe a serious, undoubtedly total injury have become unconscious. If they ever regain their consciousness, they will have to face immeasurable misery.

As far as I know, this unconsciousness can last so long that they cannot apply for justified euthanasia. But in most cases of this group, they will apply after all. Then we have to apply the main rule developed previously.

The following rules should apply to the small number who do not regain consciousness: We are missing the potential consent of the mortally injured person to the granting of death with dignity for a different reason that with the idiots. If the euthanasia is done arbitrarily under the assumption that if the mortally injured person had been able, he would have given his consent, the person giving death with dignity is running the high risk of acting out of compassion toward the unconscious person, not to rob him of his life, but to stop

the prolongation of painful dying.

I don't think that we can make regulations for this kind of euthanasia. There will be cases when the euthanasia seems to be justified. It can also happen that the person giving euthanasia has acted overhastily in the assumption that he is doing the right thing. Then he should be liable to being accused of negligent manslaughter, but not of premeditated murder.

Legally, the way should be open to leave the euthanasia, which later is found to be justified, unpunishable.

Persons, for whom euthanasia may be considered are only those who are terminally sick and in addition to being terminally sick have the wish for euthanasia, or the consent. If the person is unconscious, consent may be presumed if the sick person would have

given it if he had been able to regain consciousness.

As mentioned previously, all euthanasia which breaks the will to live is excluded.

Also excluded is the legalization of the performance of euthanasia on a patient by just anyone. I would like to use the very descriptive term proscriptio bona mente.

Just as suicide is allowed only to a single person, so the legalization of the granting of death with dignity of the terminally sick is permitted only by those who would have been able to save him under different conditions. Their act of compassion should meet sympathetic understanding by every right thinking person.

It is unwise to legally define this circle of people. Whether permission to

request or grant euthanasia may belong to a particular person or group should be examined in each individual case.

Very often the relatives will belong to the class of persons permitted to give or request euthanasia, but not necessarily always. Hate can put on the mask of pity, and Cain murdered his brother Abel.

V. THE DECISION ABOUT THE RELEASE.

It could be that these proposals for the partial legalization of euthanasia might theoretically be approved in all suggested forms or at least in part, but opposition might be raised because of the unpracticality of euthanasia.

There is good reason for saying: An always required condition for granting death with dignity is the pathological condition of continued fatal illness or irretrievable idiocy. This condition

needs objective, professional findings that should never be permitted to be made by the person granting euthanasia. It is very easy to see that someone might have a great interest in the death of someone else for reasons such as money. Such a person might successfully influence a doctor to kill his patient, or the doctor might decide by himself due to unsatisfying diagnosis, to influence his patient's fate.

Realizing the diversity of potential cases, we distinguish between the following: Is the immediate killing of an acutely ill person necessary or is there enough time for a more detailed examination? In the second group (incurable idiocy) there will always be enough time. In the third group with long lasting unconsciousness, there will sometimes be enough time and in the first

group there will be enough time for quite a large number of cases even if for most of them there might not be enough time. It should be demanded that necessary time be set aside for careful examination, but also that this examination is done as fast as possible and that the decision should be made as soon as possible. This procedure of obligatory examination should whenever possible be followed without exception.

CHAPTER 2

MEDICAL DISCUSSION OF EUTHANASIA

By Doctor Alfred Hoche

Everybody knows the law permits a person to kill in the case of self-defense. The relationship between a doctor and the life of another person must also be seen from the negative viewpoint in that the law says that the doctor shall not do certain things. The way the doctor acts is a result of his medical ethics. The public does not realize that medical ethics are not defined by law. There are some books known to some doctors which give private opinions of the authors, but there is no book which authoritatively defines what medical ethics are. There really is no law which tells you what you have to do.

The doctor goes to work in his office without knowing exactly what he

must do and what he must not do. Not even the Hippocratic Oath is really binding anymore.

When a young doctor begins practice, his ethics are influenced by many things: by knowledge learned at the university; occasional discussions; what he learned during his internship; what he has read in medical books; and his own conclusions. What the doctor does is also influenced by the medical malpractice insurance companies with which he deals. The doctor is also influenced somewhat by the Penal Code and by Medical Boards. Each of these indicate to the doctor what he should not do but do not tell him what he should do.

What the doctor does and should do are influenced by medical ethics a general summary of which is that he should always conform to general norms.

In addition, there is the responsibility of his medical ethics to heal the sick, to relieve pain, to sustain life and as much as possible to prolong it.

This most general rule is not without exception. In practice, the doctor is sometimes obligated to destroy life, as for example the killing of a live baby at the moment of birth when necessary to save the mother or the interruption of pregnancy when necessary to save the mother. The action of killing the baby is not exactly permitted but is not punishable because done in the interest of higher good and on condition that the doctor has studied the matter in a reasonable manner, and there is a necessary agreement between the patient or relative or lawful guardian.

If the act of injuring a person which the surgeon really does is not

really permitted, it is also not punished because it is found necessary when it is done with reasonable care. In every surgery you will expect a certain percentage of deaths which of course the doctor tries very hard to minimize. But still the deaths happen and you could say that because the doctor did the surgery, he died. Medical ethics is resigned to the happening of such deaths. The higher good to restore the health of many people makes the sacrifice of a few necessary. In general the consent of the patient or legal guardian is given where the doctor has to let the patient know to the best of his knowledge what are the chances of his recuperating or dying.

In addition to these previously mentioned questions, the doctor is also faced with the problem of when to interfere with the life of a person.

This is an unclear ethical problem. When a sickness is terminal and also in cases of terminal mental defects, the relatives not infrequently will express the wish that it might be over soon.

Only a short while ago a girl who was a black sheep of a family and who had attempted suicide was unconscious. I was asked by one of her relatives not to bring her back to life. It also happens that a family accuses a doctor who does not take active steps to shorten a life full of pain and devoid of value.

Generally it is a big step for the relatives to go from feeling the patient would be better off dead to actually give the permission to kill the patient. The way human nature is, however, the doctor is not safe from strong attacks or accusations of malpractice even if he has only listened to relatives requests to

shorten the life of a patient under the present law.

The doctor might even be tempted to interfere with human life for scientific reasons. I remember having such a temptation which I overcame. A child was sick with a rare and scientifically interesting brain disease and was almost certain to die within 24 hours. If that child would die in the hospital, I would have the opportunity by autopsy to find out the reason for the sickness. The father came and strongly wanted to take the child home. In this way I lost the right to view a section of the child which I would have had if the father had not wanted to take the child home. It would have been easy to give the child an injection of morphine to hurry his death by a few hours. I did not because my personal desire for scientific research

was not an important enough good to overcome the obligation of medical ethics. It would have been a different question, however, if to decide as mentioned in the present case would have resulted in the saving of many lives. The question would have had to be answered yes because of the higher good.

The doctor is also often faced with the problem of opening the road to death by not doing everything to interfere in cases in which the patient wants to die such as where a suicide attempt has made the patient mortally ill. This temptation not to interfere is especially great in the case of mental retardation in which death by all means is preferable. It does not apply to a patient who has only had a temporary depression and is temporarily unable to exercise good judgment and who has

attempted to commit suicide because he has been unable to exercise good judgment.

These cases about which I can talk out of my own experience show how complicated it is even in daily life for a doctor to observe the strict, rigid rules of ethical norms and to work for a higher good. There is no absolute but only a relative (depending on the circumstances) duty to preserve life under all circumstances. Medical ethics do not always remain the same. Historical development in the area of medical ethics shows us many changes. It it is acknowledged that the killing of the incurable or the mentally retarded is not only not punishable but is even desirable for a higher good, medical ethics would not prevent such killing.

In earlier times the indispensable law which you would never change was that you would do everything possible to sustain life. That was a great burden for doctors who would feel that it was often a great burden for the dying when doctors would interfere with a life that was dying to try to sustain it. Just as it is a bother to be awakened when you are trying to go to sleep, so it is a bother to be disturbed when you are about to die. Lay people in general have a wrong idea about the inner condition of a dying person. The consciousness of such people is mercifully darkened. Frequently after long pain they only have the wish for rest and sleep. Most would not thank anyone for constantly waking them into consciousness. They may not even be capable of realizing the good intent behind the bothering care they are

receiving.

The principle of the medical obligation to prolong life in this case is exaggerated so that `benefit becomes burden.'

The main question from a medical stand point concerning the lawful granting of death with dignity is: `Is there any human life which has lost so many human characteristics the continuation of the life for the person as well as society has lost all its value?' At first glance this question has to be answered yes in a few cases. The statement about the two groups given in the preceding essay in this book corresponds to reality. The point of view that is common to both groups is that life is devoid of value. This means something different for each group.

In the first group, the terminally ill. there may be a subjective and objective value for the life and the values taken away by euthanasia are not always the same. By contrast, for the idiots which comprise the second and larger in number group, the continuation of life for society as well as for the person himself has no value.

The condition of incurable idiots or as we say in friendly terms, the condition of mental death is, especially for a doctor dealing with the mentally retarded, something that occurs very often. Generally you can divide idiots into two big groups: In one group the people who became idiots in the course of life, while in the other group the people who were born idiots or became idiots in very early childhood due to brain damage.

For the lay person or the leader who has no medical knowledge, it should be mentioned that for the first group mental death occurs by the changing of brain cells which usually occurs at old age. Then when the brain becomes soft, the dementia paralytica occurs like paralysis in addition, because of hardening of the arteries. Finally, as happens with a large number of youthful idiots, the dementia praecox occurs. Only a certain percentage reach the most extreme degree of idiotry.

In the second group we are dealing with severe misformity of the brain, or the absence of certain major parts of the brain, or the failure of development of the baby's brain before birth, or the failure of the development of the baby's brain during the first years of life, or because of sickness during the early

years of life which stop the general development of the brain. This is very often accompanied by epileptic seizures or other seizure attacks.

Both groups can have the same high amount of mental retardation. For our purpose, however, there is a difference. The difference is in the mental inventory which we could compare with a bunch of rocks lying there without movement which no forming hand has yet touched, as compared to the ruin of a demolished building. In general, the expert will be able even without the history of the disabled person and even without examining him to see the difference between the early or later developed mental condition.

Even in the relation between the two different kinds of mental death to the environment we can see a distinctive

distinction for our consideration. In the cases of early mental retardation, there was never a mental rapport with the environment. In the cases of later developed retardation, the mental rapport may have reached its fullest measure.

Of course, the first type of persons who later developed the mental condition may have a very high rapport with the environment. The relatives and friends of these people have a different relationship to these people who became sick later. These kind of mentally dead persons could have gained quite a different affection value. There may be many different sentimental feelings toward them, for example gratitude. Many sentimental remembrances are associated with them and all these things have an effect even if the environment no longer causes a new response in them.

It is for this reason that you put a different measure to the question when to kill life devoid of value because of mental retardation, depending on the category to which they belong.

Even in considering the economic and moral burden on the environment, the institution and the state, the mental deaths mean something different. The least burden occurs in cases of dementia paralytica who from that moment on when they have complete mental death will live only for a few years. It is different in the cases of old age brain damage. A little bit longer. Youthful mentally retarded persons can live as long as 20 or 30 years, whereas in the case of complete idiocy because of early malfunction, they can live a normal life time and they need the care of two persons.

Concerning the economy, those full idiots are imposing the greatest burden on the environment and society while at the same time they are serviced by persons who are able to live a normal life.

The amount of this financial burden can be seen in the annual report of the institution. I have gone through the trouble of questioning all German institutions and I have received very good information. I have found that the average expenditure per idiot person for a year is 1,300 marks. (Editor's note: in terms of 1975 dollars, this varies depending upon what you were converting to, but would be in the neighborhood of $10,000.) If we add up all of the idiots, they number 20,000 to 30,000. If we take an average life span of 60 years, we can calculate how much capital in the

form of food, clothing, energy and national resources is deducted for an unproductive purpose. (In a footnote, Hoche then goes on to classify the various institutions and the various types of idiots and substantiates the above calculations. Dr. Hoche states in the footnote an example of an idiot living to be 80 and of many other cases where idiots have lived to be 60 or 70 years old. Although he admits that a few idiots die early, he states that mental retardation does not necessarily mean that you are going to die at an early age.)

We have not yet really mentioned the real burden.

The institutions where the idiots are cared for cannot be used for any other purpose. If you think about private institutions, you have to

consider the interest on the investment. Many thousands of nursing personnel are tied down with the completely unfruitful task of caring for these idiots and cannot do any productive work. It is terrible to think about that a whole generation of nurses becomes old next to these empty people, shells of whom many become as old as 70 years.

The question of whether we should spend all of this money on ballast type persons of no value was not important in previous years because the state had sufficient money. Now, conditions are different, and we really have to deal with this question. Our financial condition could be compared to that of a very dangerous expedition into the wilderness which can succeed only if everyone is pulling his own share. In such a case there is no room for persons

capable of only giving half, quarter or one-eighth effort. For a long time, this will be our German task: To release the greatest possible portion of productive manpower for productive purposes.

Opposed to our task is the modern effort to keep alive all kinds of weaklings and to care for all of those who are perhaps not mentally retarded, but are still a large burden. This effort is of tremendous importance because it has not been possible so far and indeed we have not yet even tried to prevent these defective people from having more defective children.

The way used to solve these problems has been the measure of the degree of the humanity of this period of time. A long and painful development over the centuries has been retarded partly because of the Christian way of thinking

which has brought us to our present level of thinking.

Considering this from a higher state morality, there is no doubt that in trying to preserve life without dignity by all means, exaggeration has occurred. We have neglected to see the state as an organism with its laws and rules, in a manner similar to the way we look at a human organism. We doctors know that in the interest of the whole human organism, single, less valuable members have to be abandoned and pushed out.

In going through all the different kinds of ballast life and in meditating about them, we can see that the principle of euthanasia does not apply to the majority of these cases. Even in the time of misery which is upon us, we will never stop to nurse physical defects of people so long as the people are not

mentally dead. We will never stop treating physically and mentally sick persons so long as there is some hope of a changing of their condition for the better.

But one of these days maybe we will come to the conclusion that elimination of the mentally dead is no crime, nor an immoral act, and no unfeeling cruelty, but a permissible and necessary act.

We are only interested here in the question of what are the qualities and effects of mental death. Some are very easy to see: the character of a parasite of the mentally dead on modern society; the absence of any productivity; a condition of complete helplessness; and the necessity of caring for the mental dead person by a third person.

The mentally dead person has no clear conception, feeling or will power.

They cannot conceive a word picture of what is going on in life. They have no sensitivity to the environment. Even where they are the object of love or caring by a third person, the mentally dead person is not sensitive toward his environment and does not realize he is being loved or cared for.

The most important thing, though, is the lack of the possibility of the mentally dead person knowing himself, the absence of self-consciousness. The intellectual level of the mentally dead person is that of very low animal life and the feelings are also most elementary and similar to those of animal life.

Thus, the mentally dead person is not able to subjectively demand life just as he is unable to carry on other intellectual processes. While it may seem that this last item is unimportant,

in reality, it means that the eliminating of mentally dead persons is not to be equated with other types of killing. Just considering it legally, the killing of a person is not always the same. The difference is not only in the motive of the killer, which may define murder, manslaughter, negligent killing, killing in self-defense and killing in a duel. The difference is also to be seen in the relationship of the dead person to his demand for life. Whereas the well planned killing of a normal man demands capital punishment, the killing in response to a request to be killed demands no more than a few years of imprisonment. In spite of this, the act of interfering in human life is actually the same in both cases. You could call the killing of a person who requests death with dignity even better planned

than a murder, but nevertheless it is punished less because the dead person has given up his demand for life and has demanded his right to death.

Because the condition of the mentally dead person prevents him from making a demand for life, if you take away his life you are not invading any of his rights.

Of course, it may be said by some that the legalization of euthanasia will open the doors to criminal abuse. Due to the distrust that many normal citizens have towards the legal aspects of the law that somehow interfere with their private lives, possibilities of interference are suspected and objected to if euthanasia is legalized. Fears of the unevenness of the law are also expressed in the feeling that it is for a rich person to get a crime excused by obtaining a document

verifying mental illness. A similar fear is expressed when the laity believes and suspects that mentally sound persons can be held against their will in institutions and have their property taken away due to a declaration of incompetency done for greedy reasons by relatives. These fears by the public have led to the development of legal safeguards which are practically inexpedient. An example is the limitation of the district attorney's right to petition for incompetency in the case of alcoholism.

Persons holding these views must be assured by carefully designed safeguards.

We must first discuss if the selection of cases can be limited to lives definitely worthless for the person himself and for society and if the selection can be done with such certainty

that all mistakes and errors are excluded.

The problem of selection can only be of concern to the laity. The physician has no doubt about the 100% certainty of correct selection, a much higher certainty that is found in deciding the question of whether a criminal being executed is mentally healthy or sick.

I know that these thoughts will not find full approval nor even understanding yet. This point of view should not keep anyone from speaking out, especially since the author after devoting more than the average life span to the medical care of humanity, has the right to be listened to in the general questions of humanity.

CONCLUSION

This Court should exercise great caution before finding any lives devoid of value. ROBERT L SASSONE, Attorney

NO 88-1503
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NANCY BETH CRUZAN, BY HER PARENTS AND CO-GUARDIANS, LESTER L AND JOYCE CRUZAN
Petitioners,
v.
DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
Respondents,
v.
THAD C. McCANSE, GUARDIAN AD LITEM,
Respondent.

Affidavit of mailing of amicus brief copies, Rule 28.2

State of California }ss.
City of Santa Ana, County of Orange }

Robert L Sassone, being first duly sworn on his oath deposes and says:

Robert L Sassone is a member of the bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on October 11, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States Mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

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Subscribed and sworn to before me on
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Lawrence D Sassone, Notary Public